No. [redacted] 55

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, PETITIONER

v.

ALLEN KAISER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
Department of Justice, Washington 25, D.C.

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (Appendix C, *infra*, pp. 20–32) is reported at 158 F. Supp. 865. The opinion of the Court of Appeals (Appendix B, *infra*, pp. 11–19) is reported at 262 F. 2d 367.

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1958 (Appendix B, *infra*, p. 19). On March 19, 1959, by order of Mr. Justice Black, the time within which to petition for certiorari was ex-

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tended to and including April 21, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether strike benefits received from a union by a worker while on strike are taxable income under the Internal Revenue Code of 1954.

STATUTE AND RULINGS INVOLVED

The statutory provision involved is Section 61(a) of the Internal Revenue Code of 1954. That section, together with O.D. 552, 2 Cum. Bull. 73 (1920) and Rev. Rul. 57-1, 1957—1 Cum. Bull. 15, are set forth in Appendix D, *infra*, pp. 34–37.

STATEMENT

During the year 1954, Allen Kaiser (taxpayer) was an employee of the Kohler Company of Kohler, Wisconsin. On March 4, 1954, a strike against the Kohler Company was authorized by the members of Local Union 833, and the strike was made effective on April 5, 1954. The strike was approved by the International Union, the United Automobile, Aircraft & Agricultural Implement Workers of America, the U.A.W. (R. 16, 19).[1] Taxpayer was not present at the meeting of Local Union 833 when the strike vote was taken and did not become a member of the union until August 1954, when he voluntarily joined. (R. 19, 23–24, 29.)

Beginning on May 4, 1954, before taxpayer became a member of the union, but while he was on strike,

[1] The record references are to the certified record. The original record has also been lodged with the Clerk.

taxpayer received strike benefit payments from the International Union, the U.A.W. (R. 23-24.) The union paid strike benefits on the basis of need and irrespective of membership in the union, but non-members, as well as members, had to be strikers before they could receive strike benefit payments. A distinction was made by the union in granting strike benefits to applicants depending on their marital status and number of dependents. (R. 28.)

The taxpayer received a total of $565.54 in strike benefit payments during the taxable year 1954. These payments were in the form of vouchers for food, clothing, and payments by the union on room rent. (R. 23-24, 28.)

After investigation and audit of the taxpayer's income tax return for 1954, the Commissioner of Internal Revenue increased taxpayer's income in the amount of the strike benefit payments. This action resulted in an additional tax of $108. Taxpayer paid the additional tax and filed a claim for refund which was rejected on the ground that the strike benefits received by him constituted income subject to tax as defined in Section 61(a) of the Internal Revenue Code of 1954. Taxpayer thereupon filed suit for refund in the United States District Court for the Eastern District of Wisconsin. (R. 15-16.) A jury rendered a verdict for the taxpayer, and the District Court entered judgment thereon. However, upon motion of the Government, the District Court set aside the verdict of the jury, vacated the judgment, and entered judgment for the

Government. (Appendix C, *infra*, p. 20.) The Court of Appeals reversed, with Judge Knoch dissenting (Appendix B, *infra*, p. 11).

REASONS FOR GRANTING THE WRIT

The Internal Revenue Service has, at least since 1920, consistently taken the position that strike benefits received from a union by a worker while on strike constitute taxable income. In the instant case, however, the Court of Appeals for the Seventh Circuit, with one judge dissenting, has held that such benefits are not to be treated as taxable income. (Appendix B, *infra*, p. 11.)

Despite the decision below, the Internal Revenue Service remains of the view that strike benefits are taxable to the recipient, whether or not such payments are made on the basis of need, and that its construction of the statute in this regard is essentially sound. Accordingly, the Service feels impelled not to abandon its long-standing position, either administratively or in litigation, unless and until authoritatively rejected.

As recognized by the district court in its opinion (Appendix C, *infra*, p. 20), although the instant case is one of first impression, the issue involved is substantial and important. According to the Bureau of Labor Statistics, many thousands of taxpayers are receiving millions of dollars in strike benefits each year. While the average benefits per worker may not be great, the need for Supreme Court review is indicated not only by the very large number of taxpayers involved but also by the widespread and growing practice of labor unions, adverted to by the Commissioner

(Appendix A, *infra*, p. 9), to provide such benefits without regard to a prior showing of need. That the situation may be expected to generate a great volume of tax controversy, which would inevitably add to the burden of already overcrowded court dockets, is further emphasized by the fact, likewise referred to in the Commissioner's letter, that some unions, in reliance upon the decision below, have advised their members not to report strike benefits in their income tax returns.

Accordingly, it is respectfully submitted, the fundamental reason for granting the writ, apart from the precise dollar effect on the revenue, lies in the fact that the issue is a continuing and growing one affecting a very large number of taxpayers, who are generally in the lowest tax brackets and can ill afford the costs of litigation. In these circumstances, we believe that it is in the interest not only of the Government but of the many taxpayers affected that the matter be definitively resolved at the earliest possible time.[2]

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals in the instant case raises a question of general importance in the administration of the tax laws which should be reviewed by this Court, notwithstanding the absence of a conflict of decisions. We believe that it is in the public interest that the Service

[2] The views of the Service, particularly in regard to its administrative practice and the importance of the problem, are more fully set out in the letter of the Acting Commissioner of Internal Revenue to the Solicitor General, dated April 10, 1959 (Appendix A, *infra*, p. 7).

be enabled to secure a prompt, authoritative determination of the correctness of its position.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

APRIL 1959.

APPENDIX A

U.S. TREASURY DEPARTMENT,
Washington, D.C., April 10, 1959

HON. J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D.C.

In re *Allen Kaiser* v. *United States* (C.A. 7th-No. 12317)

DEAR MR. RANKIN: In accordance with your request the following statement is made in connection with the above case regarding the consistency and uniformity of the administrative practice of the Internal Revenue Service under O.D. 552, published in 2 Cum. Bull. 73 in 1920, and as to the importance of the question revenuewise:

The ruling position of the Service as announced in the 1920 ruling has been consistently followed over the years in a number of unpublished rulings, issued particularly to officials of labor unions, members of Congress, and field representatives of the Service. In addition, the training courses given to Revenue Agents over a reported period of at least 15 years have instructed that strike benefits are includible in gross income. Instructions in "Your Federal Income Tax" in recent years have likewise specifically so provided. There is no known instance in which such benefits have been ruled to be excludable from income. The 1920 ruling was also reaffirmed by Rev. Rul. 57-1, published in 1957-1 Cum. Bull. 15.

Regarding enforcement of this long-established ruling policy a field survey indicates that there is a

paucity of historical data on the extent to which strike benefits have been reported on returns or taxed on audit of such returns. This is not completely unexpected in view of the enforcement procedure under which only selective spot audits can be made in the case of smaller returns and the complete absence of recording of such audits by issues, the Service not having deemed it practicable to keep any such records. The replies to the field survey did, however, indicate that, so far as can be ascertained, the ruling policy has been consistently applied to any return audited in which strike benefits were received, except in a few instances in which very small amounts were involved.

The field survey indicates that there have been a few "tax drives" in this area in various parts of the country. However, taxpayer compliance with the consistent ruling position of the Service over the years cannot fairly be appraised in terms of the known instances of enforcement. Voluntary reporting must, as in the case of related items such as small dividend and interest receipts, account for the great bulk of revenue collections; and on this, as indicated, there are no Service records.

According to the Bureau of Labor Statistics, taken from the reports of labor unions and of the National Industrial Conference Board, many thousands of taxpayers are receiving million of dollars in such benefits annually. For example, according to a report made by the United Auto Workers to its membership under date of February 16, 1959, more than $22,000,000 in strike benefits was paid to the striking members of this union alone during the calendar year 1958.

While the average benefits paid per worker may not be great, the tremendous number of taxpayers involved, combined with the fact that at least some of the unions have advised their members to rely upon

the Court of Appeals decision in the present case and not to report the strike benefits received on their returns, will, it is feared, generate a great volume of tax controversy, which cannot help but find its way onto the already over-crowded court dockets until the issue is finally resolved. It is this realization that undoubtedly led the District Court judge herein to take judicial notice of the importance of the question, as further witnessed by the fact that the A.F.L.–C.I.O. filed a brief *amicus* in the Court of Appeals.

The importance of securing a final determination as to the includibility of strike benefits in gross income seems apparent, even apart from the net revenue which may be anticipated. While the revenue per taxpayer may be small, the overall volume will be considerable in view of the great number of taxpayers involved. Moreover, enforcement costs are not great even in the cases selected for audit, and such costs must be spread over the entire taxpaying community, including the far greater number who have been and will continue voluntarily to report this item, as they have other items, such as wages, bond interest, and dividends, as to which enforcement has of necessity likewise been selective.

Although the strike benefits in the instant case covered a period both before and after taxpayer became a member of the union and were based on need, they were payable only upon his participation in the strike. Statistics published by the National Industrial Conference Board reveal that basing payments on need is not the universal practice among labor unions and that there has been a growing tendency among them to make strike benefits payable as a matter of right and without a prior showing of need. Need, according to these figures, is no longer a prerequisite with respect to 77 percent of members of national unions who receive

such benefits nationwide. Moreover, the U.A.W. at its recent convention has likewise amended its constitution so that strike benefits are based upon "The right of each member to participate in accordance with his family obligations."

The strike benefits here involved are to be distinguished from disaster benefits, such as those payable by the Red Cross, in that the strike benefits are payable only for a *quid quo pro,* namely the recipients' undertaking to go on and remain on strike, and in this sense are not to be confused with ordinary unemployment benefits, payable automatically as a matter of public beneficence and without specific consideration moving either from the recipient or to the donor.

The ruling policy of the Service regarding the taxability of strike benefits has been consistent and of long standing duration. Although it is not possible to accurately estimate the amount of revenue involved, the issue is continuing, and affects a very large number of taxpayers. For these reasons, I believe that the question is one of great importance in the administration of the Revenue laws, and that it is highly desirable, both to the many taxpayers affected and to the Government, to have the matter finally settled as quickly as possible.

Very truly yours,

CHARLES I. FOX,
(Acting) Commissioner.

APPENDIX B

In the United States Court of Appeals for the Seventh Circuit

ALLEN KAISER, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

December 22, 1958

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

Before DUFFY, *Chief Judge,* and MAJOR AND KNOCH, *Circuit Judges.*

DUFFY, *Chief Judge:* This is a suit to recover an alleged overpayment of income taxes for the year 1954. The question presented is whether strike benefits received from a union by a worker while on strike is taxable income or, in the alternative, gifts which are exempt from income tax. The jury in the District Court found the strike benefits received by plaintiff were gifts. Subsequently, the trial court set aside the verdict of the jury and entered a judgment for the defendant dismissing the complaint herein.

On April 5, 1954, plaintiff Allen Kaiser was an employee of Kohler Company of Kohler, Wisconsin. On and before said date, Local 833 UAW, an affiliate of the International Union UAW, was the certified collective bargaining agent for the production and maintenance workers employed by Kohler Company. Not all of such employees were members of the Union.

On April 5, 1954, in concert with other employees, plaintiff Kaiser went out on strike. On that date he was not a member of the Union and did not apply for membership until August 19, 1954. During the strike he did not receive any benefits in cash, but commencing May 4, 1954, he received from the Union maintenance assistance in the form of food, clothing and payments of rent on the house which he occupied with his wife and two children. The funds from which the strike benefits were distributed were derived from the local Union, the International Union, and contributions from other unions, organizations and individuals.

On April 15, 1955, Kaiser filed with the Director of Internal Revenue for the District of Wisconsin, an income tax return showing wages received in the year 1954 in the amount of $2,669.48 with a tax liability of $359.00. As wages withheld totaled $388.84, he claimed a refund. On February 17, 1956, the Director, by audit, increased the adjusted gross income by adding $565.54, the value of the maintenance assistance received by plaintiff. This resulted in a tax of $467. The plaintiff paid the sum of $108.00 as additional tax plus interest, and sued for a refund.

The basic condition for receiving strike assistance was the actual present need of the individual worker. By questionnaire, it was determined whether he needed food, clothing and shelter. Such assistance was not a matter of right like unemployment compensation. When plaintiff received his assistance, he neither gave nor promised anything in return. He was not required to render any service to the Union.

The learned trial judge apparently assum d that strike benefits constitute taxable income unless they are excepted as gifts. He relied on the broad scope of the definition in Sec. 61(a) of the Internal Revenue

Code of 1954 that "gross income means all income from whatever source derived." However, the Commissioner has long acknowledged that the concept of taxable income does not include all receipts even though such receipts were not specifically excepted from taxable income by statute. The Commissioner has ruled that income did not include damages for alienation of affections,[1] damages for breach of promise to marry,[2] an award under a wrongful death statute,[3] and payments to war prisoners for mistreatment by their captors.[4] Despite the absence of express statutory authority, the Commissioner has refused to subject to income tax the receipt of retirement benefits paid under the Federal Old Age and Survivors Insurance Systems,[5] unemployment compensation benefits paid by a state,[6] and public assistance relief payments.[7]

Public assistance benefits which have been ruled not to be taxable also provide an analogy to strike benefits. Both provide relief to the indigent. Strike benefits are intended to prevent want as are public assistance benefits.

In 1952, the Commissioner ruled that receipt of food and medical supplies and other forms of subsistence from the American Red Cross by a disaster victim did not represent taxable income.[8] About a year later, the Commissioner ruled that rehabilitation payments made to victims of a tornado disaster from a special fund set up by a large employer in the area

[1] I.T. 1804, II-2 Cum. Bull. 61 (1923).
[2] G.C.M. 4363, VII-2 Cum. Bull. 185 (1928).
[3] See I.T. 2420, VII-2 Cum. Bull. 123 (1928).
[4] Rev. Rul. 55-132, 1955-1 Cum. Bull. 213.
[5] I.T. 3447, 1941-1 Cum. Bull. 191.
[6] I.T. 3230, 1938-2 Cum. Bull. 136.
[7] Rev. Rul. 57-102, 1957-1 Cum. Bull. 26.
[8] Spec. Rul. of I.R.S., 5 Stan. Fed. Tax. Rep. § 6196.

for the benefit of his employees and their families "do not come within the concept of gross income under the provisions of § 22(a) of the [1939] Code."[9] The Commissioner emphasized that the contributions were measured solely by need.

We hold that the strike benefits received by plaintiff under the facts of this case are not taxable income. The question as to whether such benefits received under other circumstances might constitute taxable income is, of course, not presented on this record.

In any event, the strike benefits received by plaintiff were gifts which are expressly excepted from taxable income by § 102, Internal Revenue Code of 1954. There is substantial evidence in this record to sustain the finding of the jury. In *United States* v. *Burdick*, 3 Cir., 214 F. 2d 768, 771, the Court said: "As we held in *Smith* v. *Manning*, 1951, 189 F. 2d 348 whether the receipts are gifts is primarily a question of fact * * *"

The trial court adequately submitted the question of gift to the jury. Excerpts from the court's instructions are as follows:

> "Compensation for refraining from labor is taxable income * * *";
>
> "If it was the intention of the Union to pay for services, these payments are income";
>
> "If these payments were made by the Union because of any obligation, either legal or moral * * * then the payments were not gifts and you should answer the question 'no' ";
>
> "If the payments were made as compensation for services, even though the Union did not consciously have that intent, they constitute income and not gifts."

After listening to and considering these instructions, the jury found that the strike benefits received by plaintiff were gifts.

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[9] Rev. Rul. 131, 1953-2 Cum. Bull. 112.

In overruling and setting aside the verdict of the jury, the trial court was of the view that the strike benefits were made available to plaintiff pursuant to a moral obligation of the International Union to its members. However, the Union surely did not owe an obligation to plaintiff. He was not a member of the Union for four and a half months after the strike began, and yet he received strike benefits. Furthermore, there was testimony which the jury was entitled to believe that it was discretionary with the Union whether any strike benefits were to be distributed.

The second basis for the District Court's decision was that the Union exacted continued participation by plaintiff in the strike in return for receiving strike benefits. In other words, the Union, by giving plaintiff strike benefits valued at about $17 per week, for a period of eight months, has exacted from plaintiff his continued participation in the strike and abstaining from work which previously netted him $166 a week.

The answer to this contention is that if plaintiff, while remaining on strike at Kohler, had found temporary employment elsewhere, his strike benefits would have ceased. The same would have been true if members of his family had found employment, because the basic condition of receiving benefits was the present need of the plaintiff.

It seems clear that the strike benefits which were paid plaintiff were completely unrelated to his former earnings. The factor determining the amount of benefits paid to him was his personal need, his marital status and the number of dependents. The benefits were given because he and his family were in need after he ceased working. Such payments were consistent only with charity. We hold they were gifts and were not taxable.

The District Court placed reliance on O.D. 552, 2 Cum. Bull. 73 (1920) in which the Commissioner ruled that "Benefits received from a labor union by an individual *member* (emphasis supplied) while on strike are to be included in his gross income * * *" Although little if any attention seems to have been given to this obscure ruling from 1920 to 1957, the learned trial judge stated it must be held to have received Congressional approval and to have assumed the force and effect of law.

This 1920 ruling did not cover strike benefits paid by a union to non-members or to a situation where a union paid strike benefits to both members and non-members alike. In any event, the so-called reenactment doctrine is more properly applied to regulations, which have the force of law, than to rulings.[10] It has been said the rules have "no more binding or legal force than the opinion of any other lawyer."[11]

Significant also in the weight to be given to this 1920 ruling is the statement of the Supreme Court in the late case of *Commissioner* v. *Glenshaw Glass Company*, 348 U.S. 426, 431 "* * * Re-enactment—particularly without the slightest affirmative indication that Congress ever had the *Highland Farms* decision before it—is an unreliable indicium at best. * * *" This statement is particularly appropriate here, as the Government has made no showing that the 1920 rule was ever considered by Congress.

REVERSED.

KNOCH, *Circuit Judge*, dissenting: As indicated in the opinion of Chief Judge Duffy, the sole question here presented is whether strike benefits received from a union by a striking worker are taxable income to him.

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[10] *Bartels* v. *Birmingham*, 332 U.S. 126, 132.

[11] *United States* v. *Bennett*, 5 Cir., 186 F. 2d 407, 410.

Chief Judge Duffy concludes that the benefits received are nontaxable gifts. After careful consideration of the case, I regretfully find myself unable to agree.

It is true that the plaintiff, a non-member of the Union, was given strike benefits only after he had shown himself to be in need of food, clothing and shelter. The amount of aid given was based, not on his former earnings, but on his personal need, marital status and number of dependents. Such benefits would not have been given, or would have terminated, regardless of his continued participation in the strike, had his need ceased to exist through receipt of income from any other source by him or a member of his family.

However, his need was a secondary qualification to which consideration was given only after he had met the primary qualification: participation in the strike. Had he not met that primary qualification, he would have received no benefits. Had he ceased to meet that primary qualification, his benefits would have terminated notwithstanding the extent of his personal need, or whether he was a member of the Union or not. The fact that these benefits were paid to members and non-members alike emphasizes the real reason for payment, namely, either class must be in necessitous circumstances, but, above all, must be on strike.

The District Court clearly indicated that the case was allowed to go to the jury only to present a full record on appeal.

Determination of the character of the strike benefits presented a question of law. All the facts, including the Union's motivation and intent, were fully disclosed by stipulation of facts and uncontroverted testimony. *Bogardus* v. *Commissioner* (1937) 302 U.S. 34, 58 S.C. 61, 82 L. Ed. 32; *Old Colony Trust Co.* v. *Com-*

missioner (1928) 279 U.S. 716, 49 S.C. 499, 73 L. Ed. 918.

The Union did require consideration for the strike benefits bestowed on plaintiff. It was stipulated by the parties:

> The International Union grants strike benefits to non-members of the Union, who participate in a strike, if they do not have sufficient income to purchase food or to meet an emergency situation. The Union treats such non-members on the same basis as members of the Union, but non-members as well as members must be strikers before they may receive assistance from the Union.

The Court instructed the jury that compensation for refraining from labor is taxable income. The majority opinion holds that this was a question to be resolved by the jury. In the light of the stipulated facts it is my opinion that there was a question of law only, and that no factual issue remained to be presented to the jury.

I would affirm the District Judge's ruling that "'viewing the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to plaintiff' (citing cases) as a matter of law the strike benefits constituted taxable income and not a gift."

The District Court inferred Congressional approval from repeated re-enactment of the applicable sections of the Code, in the light of the 1920 ruling (described in the majority opinion) and 38 years of consistent administrative interpretation and practice. As many persons who have paid a similar tax are said to be awaiting the outcome of this cause, a policy question exists as to the advisability of making strike benefits tax free.

This dissent having been predicated on a totally different ground, however, these matters are not reached.

JUDGMENT

Filed December 22, 1958

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin, * * * and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, in accordance with the opinion of this Court filed this day.

APPENDIX C

In the United States District Court for the Eastern District of Wisconsin

ALLEN KAISER, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

OPINION

The case is before the court on the government's motion, under Rule 50(b), F.R.C.P., to set aside the verdict of the jury and the judgment entered thereon and to enter judgment in accordance with the government's previous motion for directed verdict; or, in the alternative, if the motion to set aside be denied, for a new trial.

The action was brought for refund of taxes allegedly erroneously collected. The only item in issue is an amount of $565.54 received during 1954 by plaintiff as strike benefits from the United Automobile, Aircraft and Agricultural Implement Workers of America, hereinafter referred to as the U.A.W. If such amount constitutes a nontaxable gift, plaintiff is entitled to a refund. If it represents taxable income to the plaintiff, the tax in respect thereof was correctly collected and plaintiff can have no refund.

Counsel for both parties informed the court at the time of the pretrial conference that this was a case of first impression and that there were an unbelievable number of men who had paid a similar tax under protest where a similar situation existed and who were awaiting the outcome of the trial in this case.

At the close of plaintiff's case, defendant moved for a directed verdict, and a similar motion was made at the close of all the evidence. On both occasions, the court denied the motion without prejudice. It was apparent that if this were to be a test case, it would be reviewed by appellate courts, regardless of its outcome, and the court felt that there should be a complete record so that no new trial would be necessary if the appellate court reversed.

The issue was tried before a jury and a special verdict of one question was submitted:

> Were the amounts received by plaintiff, Allen Kaiser, from May 14th to December 31st, 1954, from United Automobile, Aircraft and Agricultural Implement Workers of America, a gift?

To this question the jury answered "yes". Judgment for plaintiff was entered on the verdict; Rule 58 F.R.C.P.

Stipulations filed with the court before trial set forth the following facts: At the time he paid the tax in question, Allen Kaiser was a resident of Sheboygan, Wisconsin, and in 1954 and prior thereto was an employee of the Kohler Company at Sheboygan, Wisconsin. On March 4, 1954, a strike against the Kohler Company was authorized by the members of Local Union 833, approved by the U.A.W., which strike became effective on April 5, 1954. Kaiser was not present at the meeting of the Union when the strike vote was taken. He did not become a member of the Union until August 19, 1954. The decision to become a member of the Union was voluntarily arrived at by Kaiser. He was on strike at the time he was admitted to membership in the Union. He did not pay any initiation fee or dues because he was on strike.

Beginning with May 4, 1954, before he was a member of the Union, Kaiser received strike benefit payments

from the U.A.W. It granted strike benefits to non-members who participated in the strike if they did not have sufficient income to purchase food or to meet the emergency situation. The Union treated non-members on the same basis as members, but non-members, as well as members, had to be strikers before they could receive assistance from the Union. A distinction was made by the Union between applicants in granting strike benefits to them, depending upon their marital status and number of dependents.

At the time of the declaration of the Kohler strike the U.A.W. had $9,141,488.00 in its strike fund, and Local Union 833 had in its strike fund $63,677.88, which latter amount was transferred to the U.A.W. in 1954 and was set up in a special bank account to deal with strike expenditures and strike needs of Kohler workers.

The Constitution of the U.A.W. contained the following provisions:

> ARTICLE 12, Section 1. The International Executive Board shall execute the instructions of the International Convention and shall be the highest authority of the International Union between Conventions, subject to the provisions of this Constitution, and shall have the power to authorize strikes, issue charters and punish all subordinate bodies for violation of this Constitution.
>
> ARTICLE 12, Section 15. If and when a strike has been approved by the International Executive Board, it shall be the duty of the International Executive Board to render all financial assistance to the members on strike consistent with the resources and responsibilities of the International Union.
>
> "ARTICLE 16, Section 4. * * * Five cents (.05) of each month's dues payment must be laid aside by the Local Union as a special fund to be used in case of strike or lockout. * * *

ARTICLE 16, Section 11. All Local Unions shall pay to the International Union a per capita tax of one dollar and twenty-five cents ($1.25) per month per dues-paying member, twenty-five cents (.25) of which shall be set aside in a special fund as the International Union Strike Fund, to be drawn upon exclusively for the purpose of aiding Local Unions engaged in authorized strikes and in cases of lockout, and for that purpose only, and then only upon a two-thirds vote of the International Executive Board. * * *

ARTICLE 16, Section 13. All per capita taxes, and all other monies collected for the International Union shall be transmitted to the International Secretary-Treasurer by the twentieth of each month following collection. All such per capita taxes and other monies are strictly the property of the International Union and in no case shall any part thereof be used by Local Unions, except upon permission of the International Executive Board.

ARTICLE 49, Section 1. * * * If, as a result of this decision, a strike vote is decided upon, the Local Union Executive Board shall notify all members, and it shall require a two-thirds vote by secret ballot of those voting to declare a strike. Only members in good standing shall be entitled to vote on the question of declaring a strike.

ARTICLE 49, Section 5. Before a strike shall be called off, a special meeting of the Local Union shall be called for that purpose, and it shall require a majority vote by secret ballot of all members present to decide the question either way. Wherever the International Executive Board decides that it is unwise to longer continue an existing strike, it will order all members of Local Unions who have ceased work in connection therewith to resume work and thereupon and thereafter all assistance from the International Union shall cease.

> ARTICLE 49, Section 6. Any Local Union engaging in a strike which is called in violation of this Constitution and without authorization of the International President and/or the International Executive Board shall have no claim for financial or organizational assistance from the International Union or any affiliated Local Union.

The testimony at trial showed that strikers were not required to serve on the picket lines, help in the soup kitchen, or render like services in order to receive strike benefits. They were encouraged to do so and were regarded by the Union as having a moral obligation to do so. The amount of $565.54 received by Kaiser as strike benefits was in the form of food, clothing, and payments by the Union on his room rent.

There was testimony that on occasion the Union had used money from this strike fund for flood relief and other charitable purposes. This usage is directly contrary to the express provisions of Article 16, Section 11 of the Constitution of the International Union quoted above.

Two of the arguments advanced by the government in support of its motion for a new trial have little weight: First, it is alleged that error was committed because the court did not specifically ask the jury, in the verdict, whether the Union intended to make a gift of the $565.54 to Kaiser. Accordingly, objection is made to the verdict used by the court which asked only whether the amounts received by Kaiser were a gift. To this point it is but necessary to answer that the proposed verdict submitted by the government to the court on the morning of trial consisted of a single question which asked whether "the sum * * * received by [Kaiser] from the Union * * * was a gift;" to point out that the government itself proposed an alteration in the verdict which was actually

used and expressed satisfaction in the final form of the verdict when the court accepted the alteration; and to note that at no time did the government request the court to submit a separate question on the specific item of intent. The court is satisfied that the verdict used was the proper one for this case. The matter of intention of the Union was thoroughly covered in the instructions to the jury.

The government also claims that the court's instructions were erroneous in that they included an instruction to the effect that the absence or presence of consideration in the legal sense is not the controlling factor in cases involving the question whether voluntary payment for services is compensation or income, but the sole question in that respect is the intention with which the payment was made. Also claimed to be erroneous is that part of the instructions which stated that whether the receipts were gifts is primarily a question of fact to be resolved under the peculiar circumstances of this case, and that in determining whether the payments were gifts, the intention with which the payments, however voluntary, were made, rather than the presence or absence of consideration therefor, controls. To these objections it may be answered that when the context is considered it is clear that the court was not instructing the jury to disregard the presence of legal consideration, if it found such to exist, but rather the court, in accordance with the law, was instructing the jury that a voluntary payment made without the presence of legal consideration may nonetheless be taxable income rather than a gift if the intent of the payor was to confer a reward for some service or benefit to him. Such an instruction was clearly to the benefit of the government. Examination of the instructions as a whole reveals that the court repeatedly instructed the

jury that if the payments were made by the Union in exchange or return for something the Union wanted from Kaiser, the jury must find the $565.54 to be taxable income. The court told the jury that before it could find the strike benefit to be a gift, it must find that the amount was not paid—

> As compensation for refraining from labor (Tr. 141).
>
> Under any legal or moral obligation (Tr. 142).
>
> As compensation for services (Tr. 143).
>
> As a remuneration for something the Union wanted done or omitted (Tr. 143).
>
> As anything due to the plaintiff (Tr. 143).
>
> In expectation of any return (Tr. 143).

However, the government's motion is more soundly based, insofar as it rests on the contention that under the evidence of the case, "viewing the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to plaintiff" [*Shaw* v. *Hines Lumber Co.* (C.A. 7, 1957) 249 F. 2d 434, 439], as a matter of law the strike benefits constituted taxable income and not a gift.

The evidence in this case is not disputed. The question basically is one of interpretation of the statutes. Findings are held to be subject to review on this question. *Bogardus* v. *Commissioner* (1937), 302 U.S. 34, 38–39, 58 S. Ct. 61, 82 L. Ed. 32; *Willkie* v. *Commissioner* (C.C.A. 6, 1942) 127 F. 2d 953, 955; cert. den. 317 U.S. 659, 63 S. Ct. 58, 87 L. Ed. 530.

The 1954 Code sections applicable to the question are sections 61(a) and 102(a). Section 61(a) defines gross income as "all income from whatever source derived." Section 102(a) provides that "gross income does not include the value of property acquired by gift * * *" Thus, gross income is defined in sweeping terms and should be broadly construed in

accordance with an obvious purpose to tax income comprehensively.[1] The definition is very comprehensive,[2] intended to be far-reaching, and indicates the purpose of Congress to use the full measure of its taxing power.[3] Construction should be liberal and consonant with that purpose. On the other hand, provisions granting exemption from tax, such as 102 (a), are to be construed strictly and with restraint.[4] Words of exemption or exclusion are not to be extended beyond their plain meaning,[5] and exemptions cannot rest upon implication.[6] Specifically, section 102(a), exempting gifts from income tax, should not be construed liberally in favor of one claiming the exemption, but rather in such way as to give section 61(a) its proper effect.

As previously indicated, the material facts in this case are all either stipulated or supported by uncontroverted testimony. It is not disputed that the strike benefits were paid by the International Union on the basis of need and irrespective of membership in the Union. These facts, standing alone, indicate a gift. But it is also undisputed that the strike was being conducted with the approval of the International

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[1] *Commissioner* v. *Jacobson* (1949) 336 U.S. 28, 48–49, 69 S. Ct. 358, 93 L. Ed. 477.

[2] *Commissioner* v. *Lo Bue* (1956 351 U.S. 243, 246–247, 76 S. Ct. 809, 100 L. Ed. 1142; reh. den. 352 U.S. 859, 77 S. Ct. 21, 1 L. Ed. 2d 69.

[3] *Commissioner* v. *Glenshaw Glass Co.* (1955) 348 U.S. 426, 429–430, 75 S. Ct. 473, 99 L. Ed. 483; reh. den. 349 U.S. 925, 75 S. Ct. 657, 99 L. Ed. 4256; *Helvering* v. *Clifford* (1940) 309 U.S. 331, 334, 60 S. Ct. 554, 84 L. Ed. 788.

[4] *Commissioner* v. *Jacobson*, *supra* n. 1, 336 U.S. 48–49.

[5] *Helvering* v. *American Dental Co.* (1942) 318 U.S. 322, 329, 63 S. Ct. 577, 87 L. Ed. 785.

[6] *U.S. Trust Co.* v. *Helvering* (1939) 307 U.S. 57, 60, 59 S. Ct. 692, 83 L. Ed. 1104.

Executive Board, that Article 12, Section 15 of the International Union Constitution made it "the *duty* of the International Executive Board to render all financial assistance to the members on strike consistent with the resources and responsibilities of the International Union" (emphasis supplied), and that it was required of every person to whom benefits were paid that he join the strike and continue to remain on strike. If plaintiff had been a member of the Union before the strike and had paid his dues, deductible by him and not taxable as income to the Union, he would certainly have had a moral right to strike benefits and might well have been able to enforce that right if the Union arbitrarily denied benefits to him. In such a case an even more clear-cut question would be presented.

A gift, within the meaning of section 102(a), is the receipt of financial advantages gratuitously,[7] is made from a detached and disinterested generosity,[8] without the incentive of anticipated benefit of any kind beyond satisfaction of doing a generous act,[9] without consideration,[10] for that only is a gift which is purely such,[11] without the compulsion of moral or legal duty,[12] and is basically something for nothing.[13] The

[7] *Helvering* v. *American Dental Co.*, *supra*, n. 5, 318 U.S. 329; *United States* v. *Burdick* (C.A. 3, 1954) 214 F. 2d 768, 771.

[8] *Commissioner* v. *Lo Bue*, *supra*, n. 2, 351 U.S. 246–247.

[9] *Bogardus* v. *Commissioner* (1937) 302 U.S. 34, 41, 58 S. Ct. 61, 82 L. Ed. 32.

[10] *Webber* v. *Commissioner* (C.A. 10, 1955) 219 F. 2d 834, 836; *Noel* v. *Parrott* (C.C.A. 4, 1926) 15 F. 2d 669, 671; cert. den. 273 U.S. 754, 47 S. Ct. 457, 71 L. Ed. 875; *Schumacher* v. *United States* (Ct. Cl., 1932) 55 F. 2d 1007, 1011.

[11] *Bass* v. *Hawley* (C.C.A. 5, 1933) 62 F. 2d 721, 723.

[12] *Bogardus* v. *Commissioner*, *supra* n. 9, 302 U.S. 41.

[13] *Commission* v. *Lo Bue*, *supra* n. 2, 351 U.S. 247; *Commissioner* v. *Jacobson*, *supra* n. 1, 336 U.S. 50; *Helvering* v. *American Dental Co.*, *supra* n. 5, 318 U.S. 331.

voluntary character of the payment is not determinative, for a payment may constitute income to the recipient though made to him without legal obligation.[14]

Applying these rules of law and construction to the undisputed evidentiary facts, it is the opinion of this court that as a matter of law the payments to Kaiser constituted income taxable to him and cannot be brought within the gift exclusion. The payments were made to its members by the International Union under a moral obligation imposed by its Constitution. They were made to all strikers pursuant to a plan whereby something of value to the Union was exacted in return from the recipient, namely, his continued participation in the strike. Either reason is sufficient to prevent the payments from being a gift.

This conclusion is also demanded by the administrative treatment of strike benefits. In 1920, by O.D. 552, C.B. No. 2, p. 73, Internal Revenue issued and promulgated a ruling which dealt with the point in issue in this case:

> Benefits received from a labor union by an individual member while on strike are to be included in his gross income for the year during which received, there being no provision of law exempting such income from taxation.

For thirty-eight years, except as reaffirmed by Rev. Rul. 57-1, I.R.B. 1957-1, 10, this ruling has remained unchanged through repeated Congressional re-enactments of the relevant income tax sections (now 61(a) and 102(a) of the 1954 code.)[15] Thus, the administrative interpretation and practice must be said to have always been seasoned and settled, uniform and consistent. Considering the length of time the unvaried

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[14] *Old Colony Trust Co.* v. *Commissioner* (1929) 279 U.S. 716, 730, 49 S. Ct. 499, 73 L. Ed. 918; *United States* v. *Burdick*, *supra* n. 7, 214 F. 2d 771.

[15] *Commissioner* v. *Jacobson*, *supra*, n. 1, 336 U.S. 48-49.

ruling and practice has been in effect, the non-technical nature of the question, and the importance of the issue in both the tax and labor fields, it must be concluded that Congress was aware of the administrative interpretation when it repeatedly re-enacted the sections. Under such circumstances, the administrative interpretation is not only entitled to great weight, but must be held to have received Congressional approval and to have assumed the force and effect of law. *Corn Products Co.* v. *Commissioner* (1955) 350 U.S. 46, 52–53, 76 S. Ct. 20, 100 L. Ed. 29; reh. den. 350 U.S. 943, 76 S. Ct. 297, 100 L. Ed. 823; *United States* v. *Leslie Salt Co.* (1955), 350 U.S. 383, 389, 76 S. Ct. 416, 100 L. Ed. 441; *Commissioner* v. *South Texas Lumber Co.* (1948), 333 U.S. 496, 501, 68 S. Ct. 695, 92 L. Ed. 831; reh. den. 334 U.S. 813, 68 S. Ct. 1014, 92 L. Ed. 1744; *Crane* v. *Commissioner* (1947), 331 U.S. 1, 7–8, 67 S. Ct. 1047, 91 L. Ed. 1301; *Commissioner* v. *Flowers* (1946), 326 U.S. 465, 469, 66 S. Ct. 250, 90 L. Ed. 203; *Boehm* v. *Commissioner* (1945), 326 U.S. 287, 291–292, 66 S. Ct. 120, 90 L. Ed. 78; *White* v. *United States* (1938), 305 U.S. 281, 291, 59 S. Ct. 179, 83 L. Ed. 172; *Helvering* v. *Winmill* (1938), 305 U.S. 79, 83, 59 S. Ct. 45, 83 L. Ed. 52; *Zillmer* v. *United States* (C.A. 7, 1956), 238 F. 2d 912, 914; *Parker Pen Co.* v. *O'Day* (C.A. 7, 1956), 234 F. 2d 607, 609–610; *Gunn* v. *Dallman* (C.A. 7, 1948), 171 F. 2d 36, 38; cert. den. 336 U.S. 937, 69 S. Ct. 747, 93 L. Ed. 1095.

Nor is a distinction to be made, looking to this early administrative ruling, between strike benefit payments to members and, as occasionally happens, to non-members. As pointed out, in neither case can the payments be gifts.

> "* * * The determination that strike benefit payments are includible in gross income is not affected by * * * the fact that such payments or distributions are also made to persons who

are not members of the union. * * *" Rev. Rul. 57-1, I.R.B. 1957-1, 10.

The court is aware of the line of decisions holding that when the Internal Revenue Services makes a ruling on an obscure question, on a question that does not recur repeatedly, where a construction is neither uniform, general, nor of long standing, it is not entitled to substantial weight. The basis of that rule is that it is not to be presumed that Congress follows all the rulings of the Internal Revenue Service. This case involves a situation where a ruling is not only of long standing but concerns, and has over the years, thousands and thousands of men. It is a matter of great public interest. The court is of the opinion that it falls within the type situation where repeated congressional re-enactments of the tax sections, without change, should be held to be an acquiescence in the administrative interpretation and practice.

One would also be loathe to believe that Congress intended that each one of these cases, of which there are thousands, should be tried as a question of fact. If such were the situation, the results would not be uniform, the cost would be prohibitive both to the taxpayer and the government, court calendars would be flooded with these cases, the government would have to vastly increase its staff of attorneys, and chaos and inequities would be the result. The court believes that if such a situation is to be brought about, it should be brought about by Congress. It is inconceivable that Congress did not intend the law to be uniform.

There is no ground for believing that it has suddenly become the intent of Congress, without any official act or indication, to reverse the situation that has existed for almost forty years and now treat strike benefits as tax-free gifts. It is not the province of the courts to legislate in tax matters either di-

rectly, by their own pronouncements, or indirectly, but equally effectively, by allowing jury verdicts to stand which are contrary to law. To do so is to pervert the judicial power. *Heiner* v. *Donnan* (1932), 285 U.S. 312, 331, 52 S. Ct. 358, 76 L. Ed. 772.

For the foregoing reasons, the court believes that no jury issue was presented and that the government was entitled to have its motion for directed verdict granted.

Counsel for the United States are directed to prepare an appropriate order, submitting it to counsel for the plaintiff for approval as to form only.

Dated, Milwaukee, Wisconsin, this 19th day of February, 1958.

K. P. GRUBB,
U.S. District Judge.

In the United States District Court for the Eastern District of Wisconsin

ORDER

This cause coming on to be heard upon a motion of the defendant for judgment in accordance with defendant's motion for directed verdict, or in the alternative, for a new trial, and the Court having considered each of the motions,

IT IS ORDERED: That the motion of the defendant to set aside the verdict and the judgment entered thereon for the plaintiff, and for judgment for the defendant notwithstanding the verdict in accordance with defendant's motion for a directed verdict is granted, and judgment for the defendant may be entered accordingly; and

IT IS FURTHER ORDERED: That defendant's alternative motion for a new trial is denied.

Dated at Milwaukee, Wisconsin, this 12th day of March, 1958.

/s/ K. P. GRUBB,
United States District Judge.

Approved as to form only:

/s/ Max Raskin,
MAX RASKIN,
Attorney for Plaintiff.

In the United States District Court for the Eastern District of Wisconsin

JUDGMENT FOR DEFENDANT

This cause came on for trial before the Court and a jury on the 14th day of November, 1957, both parties appearing by counsel, and the Court on motion of the Defendant having set aside the verdict for the plaintiff and the judgment entered thereon, and having granted defendant's motion for a directed verdict in its favor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, That plaintiff take nothing; that the action be and it is hereby dismissed on the merits; and that defendant have and recover from plaintiff its costs in the action.

Dated at Milwaukee, Wisconsin, this 28th day of March, 1958.

K. P. GRUBB,
United States District Judge.

APPENDIX D

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) GENERAL DEFINITION.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance endownment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

(26 U.S.C. 1952 ed., Supp. V, Sec. 61.)

O.D. 552, 2 Cum. Bull. 73 (1920):

Benefits received from a labor union by an individual member while on strike are to be included in his gross income for the year during which received, there being no provision of law exempting such income from taxation.

Rev. Rul. 57–1, 1957–1 Cum. Bull. 15:

The Internal Revenue Service has been requested to reconsider the position it stated in O.D. 552, C.B. No. 2, 73 (1920), which holds that strike benefits received by a member of a labor union are includible in his gross income for the year during which received. A similar position was taken in I.T. 1293, C.B. I–1, 63 (1922), to hold that amounts paid by an organized union as unemployment benefits to its unemployed members are includible in the gross income of the recipients.

Members of a labor union pay dues to the union, a portion of which is laid aside in a special fund to be used in case of a strike or lockout. Strike benefits are paid according to individual need and have no correlation to the amount of dues paid by the recipient, or to the amount of benefits received by other members. The strike benefit payments, which are not paid pursuant to any contract, are paid to members as well as nonmembers of the union. Presumably, any benefits to nonmembers are equally in furtherance of the objectives of the strike. The specific question presented is whether the strike benefit payments paid under the above circumstances constitute income or whether they are tax free gifts to the recipients.

Section 61 of the Internal Revenue Code of 1954 states that "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived * * *." This section has the same breadth of scope as section 22(a) of the Internal Revenue Code of 1939 and executes the mandate of the 16th Amendment to the Constitution. See U.S. Senate Report No. 1622, 83rd Congress, 168. For a recent reiteration of this principle, see *Commissioner* v. *Glenshaw Glass Company et al.*, 348 U.S. 426, Ct. D. 1783, C.B. 1955–1, 207. As pointed out by the Court in that case, Congress applied no limitation as to the source of tax-

able receipts, nor restrictive labels as to their nature.

Strike benefit payments are included within the broad definition of gross income and do not fall within any of the exclusions provided for in the Code, including the exclusions for gifts under section 102. They are paid only upon the event of a strike which is a means employed by the union and its members for securing economic benefits, and, for this reason, they do not constitute amounts gratuitously paid or received. The determination that strike benefit payments are includible in gross income is not affected by the fact that such payments may take the form of staple goods which are distributed on the basis of need or the fact that such payments or distributions are also made to persons who are not members of the union.

The above position does not conflict with I.T. 3230, C.B. 1938–2, 136, wherein unemployment compensation benefits, paid by a state agency from funds withdrawn from the Federal Unemployment Trust Fund pursuant to Title IX of the Social Security Act, were not considered as taxable income, or I.T. 3447, C.B. 1941–1, 191, wherein benefits under the Social Security Act were held not subject to taxation. The benefits in these cases were held not to constitute taxable income because it was believed that Congress intended that such benefits be not subject to tax. However, there is no evidence that Congress intended to exclude strike benefits from income. Nor does the above position conflict with S.S.T. 247, C.B. 1938–1, 449, wherein it was held that strike benefits do not constitute "wages" for the purposes of the Social Security Act, since such benefits do not constitute remuneration for services paid by an employer to an employee. Consistent with the holding therein made, it is held that strike benefits do not constitute wages paid by the union to its members for purposes of income

tax withholding and the taxes imposed by the Federal Insurance Contributions Act and the Federal Unemployment Tax Act. Such benefits are nevertheless income and, as such, are includible in gross income for Federal income tax purposes.

Revenue Ruling 131, C.B. 1953–2, 112, which holds that disaster benefits provided by an employer for his employees are not taxable income, is also distinguishable from the instant situation. That Revenue Ruling stated, in part, "such contributions, measured solely by need, are considered gratuitous and spontaneous." Such situation does not exist in the instant case since the payments made are neither spontaneous nor primarily donative in character but are made in furtherance of a strike, which is a means employed to secure legitimate economic benefits for members of the union.

Revenue Ruling 54–190, C.B. 1954–1, 46, holds that noncontractual payments made out of a union fund are nevertheless taxable to the recipient union members. In that ruling, the pensions paid to the members were directly attributable, to their employment while members of the union as well as to their payment of union dues. The pensions could not be said to be paid to them without consideration and, therefore, were not gifts.

Accordingly, the strike benefit payments received under these circumstances do not constitute gifts but constitute income and are includible in the gross income of the recipients even though distributed on the basis of their need and regardless of whether the recipients are members or nonmembers of the union. If the benefits are paid in goods rather than cash, the fair market value of the goods at the time received is the amount to be included in gross income.

U. S. GOVERNMENT PRINTING OFFICE: 1959